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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 308

THADDEUS G. BENTON and J. LAMAR BUTLER,
Petitioners,

v.

GLENN McCARTHY, GLENN McCARTHY, INC., and WILLIAM McCARTHY, *Respondents.*

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioners are reluctantly impelled by material misstatements of critical facts in respondents' brief in opposition to file this brief.

POINT I

RESPONDENTS DISTORT THE FACTS OF THE DISTRICT COURT'S FINDINGS

Respondents attempt to destroy petitioners' principal ground for the writ, viz. that respondents as principals may not rely upon non-performance of a condition precedent to escape liability for commission to a broker when non-performance was caused by their own fault. They misstate as a fact that it is "plain from the findings below that this question is not in the case." (p. 2).

Respondents then misstate as a fact that

> "The District Court found: that the *frustration* of the financing agreement brought about by the plaintiff's efforts *was not the result of non-performance of a condition precedent;* that the financing agreement was terminated in good faith, and *by reason of circumstances beyond the control of the* parties; * * *" (Italics supplied)

The italicized portion of the statement is a distortion, and misleading.

Respondents make no attempt to cite or quote any part of the findings of the District Court claimed to support their reckless statement of critical facts. Being a misstatement of fact of what the District Court found as facts, the statement is not excusable as an argument.

The total findings by the District Court in any way relating to the statements of facts by respondents are only as follows (Appendix to Appellants' Brief, court of Appeals, blue cover, R. 2038-2039):

> "For the purposes of the record, however, I find that Glenn McCarthy, Inc. in good faith attempted to carry out its obligations under the contract of June 20, 1955. These included securing from the Mutual Security Agency of the United States Government a guarantee against expropriation of the lease and a guarantee of the convertibility of funds derived from the sale of oil and gas produced from the lease into United States dollars. However, Glenn McCarthy, Inc. *was unable to comply with these conditions within a reasonable time after the execution of the contract.*
>
> "I find that the contract of June 20, 1955 was terminated by mutual consent of the parties on April 23, 1956, after efforts in good faith by Glenn

McCarthy, Inc. to comply with the terms and conditions thereof.

"I find, further, that such termination by the parties was in good faith and arose because of *difficulties and complications* during the period of time when the contract remained in effect. These complications included the difficulties of obtaining the necessary guarantees against expropriation and as to convertibility and the need for substantially greater financing than the Keljikans were prepared to supply, in view of the prospects opened up by negotiations with the Anaconda Copper Company and its subsidiaries and representatives. In fact, these difficulties and complications are in themselves an indication of the reason why the understanding between Glenn McCarthy, Inc. and Butler for the payment of commissions was conditioned upon the actual receipt of money by way of financing by Glenn McCarthy, Inc. from the Keljikans or any other financier." (Italics supplied)

It is thus clear that respondents' misstatement of fact that the District Court found that the "frustration of the financing agreement brought about by the plaintiffs' efforts *was not the result of nonperformance of a condition precedent*" and that the "financing agreement was terminated in good faith, and *by reason of circumstances beyond the control of the parties*" is untrue and if not compared with the real findings would be misleading.

Neither the District Court, nor the Court of Appeals, made any such findings of facts; nor did their opinions imply any such findings of facts.

The most that can be said about the findings of the District Court is that McCarthy attempted to perform

his obligations the performance of which would have required the payment of the purchase consideration, and the payment of the commission; that he was unable to do so within a reasonable time; that the June 20, 1955 sales contract was terminated April 23, 1956 by mutual consent of the parties after failure of McCarthy to perform his obligations; and that such termination was in good faith and resulted because of unexplained difficulties and complications, while the sales contract was in force, of obtaining the guarantees against expropriation and for convertibility of foreign funds into dollars, and of the need for greater financing than the purchaser was prepared to supply in view of the prospects for profit presented by negotiations with Anaconda Copper Company.

Nowhere is there any finding that the "frustration" of the financing agreement "*was not the result of nonperformance of a condition precedent*", nor any finding that the termination of the financing agreement was "*by reason of circumstances beyond the control of the parties.*"

The Court of Appeals, in appraising and stating the ultimate facts, simply noted that defendants were "*unable*" to procure the guarantees ("within a reasonable time after the execution of the contract" as found by the District Court), for which reason "the agreement was terminated without any payment being made by Keljikan." The procurement of the guarantees was a condition precedent to the payment of the purchase consideration, and as respondents were unable to perform that condition precedent expressly assumed, they cannot rely upon the condition precedent to escape liability for the commission.

The full and correct facts on that subject are stated at pages 5-10 of the petition herein.

Even if it were true that the termination of the sales contract was by reason of circumstances beyond the control of respondents, the non-performance of the condition precedent deliberately assumed and represented to being readily performable, could not excuse respondents from responsibility for failure to perform the condition precedent—especially where, as here, the termination of the contract was induced by the obligor's desire and purpose to make a more profitable transaction with parties other than the purchaser. See authorities in petition, *Gaston*, p. 24, *O'Hara*, p. 27, and *Holman*, p. 28.

Petitioners show that respondents' attorney in the Courts below, Mr. Mittelman, whose conduct is referred to at page 13 of the petition, does not appear of record in this proceeding.

POINT II

RESPONDENTS' POSITION IS BASELESS AND DEFENSELESS

Except for respondents' distortions of the findings of fact by the District Court that cannot be excused as permissible argument; respondents fail wholly to show any defense to the compelling grounds asserted by petitioners for the granting of the writ.

CONCLUSION

For the compelling reasons aforesaid, and the true facts set forth in the petition for the writ that are uncontradictable, petitioners pray that the Court will forthwith,

(a) issue its writ of certiorari;

(b) concurrently reverse the judgments of the U. S. Court of Appeals and the District Court, and adjudge that liability on the express agreement between the parties exists for the "reasonable percentage" of the financing contracted to be paid to respondent corporation, despite the fact that the financing payments were not made, by reason of its non-performance of the conditions precedent to the payment of the purchase price and its termination of the sales agreement; and

(c) issue an order to respondents to show factual and legal cause, by sworn answer, why the judgment of the District Court should not be also reversed insofar as it holds that petitioner Benton is not also entitled to judgment with his co-broker and co-petitioner Butler for his share of the commission, and insofar as it holds that Glenn McCarthy individually is not jointly and severally liable for the commission—all as shown on pages 18-21 of the petition herein.

If the Court should not grant the relief prayed under (b) above, it is respectfully urged that the order under (c) should require respondents also to show cause why the judgment of the District Court should not also be reversed insofar as it holds that the promise to pay the commission was conditioned upon the purchase consideration being actually received by Glenn McCarthy, Inc.—for all the reasons shown on pages 13-18 of the petition herein.

If the writ be granted, but the further relief prayed hereinabove in (c) be not concurrently granted, petitioners pray that the Court will concurrently reverse the decision of the Court of Appeals as prayed in (b) above, and direct a new trial of the remaining issues.

Respondents' total failure to disprove the real facts set forth in the petition, the evidence and the controlling law as also set forth in the petition, their dismal failure to assert any honest "matter or ground why the cause should not be reviewed by this Court", and their bold and false description of the facts found by the trial court, justify the issue of the writ and the reversal of the judgment of the United States Court of Appeals, and the order to show cause above prayed, to avoid the costly and burdensome process of printing and considering a large record on points not subject to fair contradiction, and in conformity with the purpose of the Federal Rules of Civil Procedure, No. 1:

> "They shall be construed to secure the just, SPEEDY, and INEXPENSIVE determination of every action."

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NOTE: Having been unable to obtain the views of New York co-counsel within the limited time available, their names do not appear on this brief.